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Alexander Colvin

Cornell University, ajc22@cornell.edu

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Employment Arbitration: Empirical Findings and Research Needs

Abstract

[Excerpt] There is vociferous opposition to employers forcing pre-dispute arbitration agreements on employees. Critics argue that employees are not voluntary participants in the process, which they say unfairly favors employers. Advocates of mandatory arbitration dispute these charges and argue that arbitration offers employees and employers significant advantages over litigation. For example, they argue, among other things, that that litigation is not as accessible as arbitration because lawyers will not take low value employment cases on a contingency basis.

Critics of mandatory employment arbitration have moved the debate into the legislative arena. Bills have been introduced in state legislatures and in Congress that would, if enacted, substantially change the current arbitration system. For example, the proposed "2009 Arbitration Fairness Act" would amend the FAA to largely overturn *Gilmer* and *Circuit City* by expressly invalidating mandatory pre-dispute arbitration agreements imposed on employees and consumers, and allowing only voluntarily signed, post-dispute arbitration agreements for these classes of claimants.

Empirical research has an important role to play in this debate. By shedding light on how employer-promulgated arbitration systems operate, researchers can inform the discussion of public policy and legislative decision making. This column will look at some recent empirical research to see what it can tell us about the current system of employment arbitration and then identify areas in need of additional research.

Keywords

employment arbitration, mandatory arbitration, participation, employment relations, individual rights

Disciplines

Collective Bargaining | Dispute Resolution and Arbitration | Labor Relations

Comments

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Employment Arbitration: Empirical Findings and Research Needs

BY ALEXANDER J.S. COLVIN

The author is an associate professor of collective bargaining and conflict resolution at the ILR School at Cornell University. He is also associate director of the Scheinman Institute. His research and teaching focuses on labor and employment dispute resolution.

Some 18 years ago the Supreme Court's *Gilmer* decision¹ ushered in the modern era in employment arbitration. The subsequent *Circuit City* case² decided by the Supreme Court interpreted the employment exclusion in Section 1 of the Federal Arbitration Act (FAA) in a manner that made the FAA apply to most employment arbitration agreements, including those imposed on employees by employers as a condition of employment. As a result of these decisions, the use of mandatory pre-dispute arbitration agreements has grown significantly.³ Based on a survey I conducted in 2003 of 291 nonunion workplaces, I found that 22.7% of nonunion employees were covered by employer-promulgated arbitration agreements. A more recent survey conducted in 2007 by Prof. David Lewin of UCLA found that of 757 nonunion businesses, 354 or 46.8% had promulgated employment arbitration programs.⁴

There is vociferous opposition to employers forcing pre-dispute arbitration agreements on employees. Critics argue that employees are not voluntary participants in the process, which they say unfairly favors employers.⁵ Advocates of mandatory arbitration dispute these charges and argue that arbitration offers employees and employers significant advantages over litigation. For example, they argue, among other things, that that litigation is not as accessible as arbitration because lawyers will not take low value employment cases on a contingency basis.⁶

Critics of mandatory employment arbitration have moved the debate into the legislative arena. Bills have been introduced in state legislatures and in Congress that would, if enacted, substantially change the current arbitration system. For example, the proposed "2009 Arbitration Fairness Act"⁷ would amend the FAA to largely overturn *Gilmer* and *Circuit City* by expressly invalidating mandatory pre-dispute arbitration agreements imposed on employees and consumers, and allowing only voluntarily signed, post-dispute arbitration agreements for these classes of claimants.

Empirical research has an important role to play in this debate. By shedding light on how employer-promulgated arbitration systems operate, researchers can inform the discussion of public policy and legislative decision making. This column will look at some recent empirical research to see what it can tell us about the current system of employment arbitration and then identify areas in need of additional research.

Early Research Results

One problem for researchers has been the dearth of publicly available data on which to conduct empirical research that would help evaluate the arguments of both sides of the employment arbitration debate. There is no government agency that collects statistics on the number of employees covered by employer-promulgated arbitration programs or the outcomes of arbitration cases filed under these programs. What research has been done is based on data made available to individual researchers by arbitration

service providers, most notably the American Arbitration Association (AAA) and the Financial Industry Regulatory Authority (FINRA). For example, the AAA made available to Elizabeth Hill data on its employment cases decided in 1999-2000. She and Prof. Theodore Eisenberg analyzed the data and published their report in the *Dispute Resolution Journal* in November 2003.⁸

This data included cases decided under both employer-promulgated and individually negotiated agreements, which they analyzed separately. One of the variables they studied was the time it takes to resolve employment cases in arbitration, a metric commonly used to evaluate the claim that arbitration is faster and more efficient than litigation.

They divided the AAA cases into two categories, one involving civil rights claims and the other non-civil rights claims. They found that out of 172 non-civil rights cases resulting in an award, the average (mean) time to issuance of an award was 270 days. In the 42 civil rights cases that went to an award, the average time to disposition was 276 days. They compared this with reported federal court data from 1999-2000 and state court data from 1996. This data showed that the average time to trial of 170 non-civil rights cases in state was 723 days. For the 163 civil rights cases in state court, the average disposition time was 709 days, and for the 1,430 civil rights cases in federal court, it was 818 days.

The comparison showed that arbitration was indeed faster than litigation for both civil rights and non-civil rights cases.

More Recent Research

Fortunately, more data on arbitration cases under employer-promulgated plans has become public due to California's enactment of a law that requires private arbitration service providers to report certain information about employment, consumer and certain other kinds of cases they administer nationally.⁹ I used data the AAA reported in compliance with this statute to conduct a study of employment arbitration involving employer-promulgated arbitration agreements.¹⁰ The AAA report showed that there were 2,763 employment cases reaching disposition¹¹ between Jan. 1, 2003, and Sept. 30, 2006, of which 836 went to award.

One of the variables my study examined was the time between filing the demand to issuance of an award following a hearing. My study found that the average time to an award was 332 days. This finding compared favorably with the two-three years it takes to reach disposition by trial, according to the litigation data Eisenberg and Hill used and other studies of employment litigation. Thus it appears that arbitration remains a faster process than litigation for obtaining a hearing, perhaps on average one to two years faster.¹²

Areas for Further Research

Most cases are resolved by settlement, whether they are in litigation or arbitration. The earlier a case settles, the shorter the process, which would tend to shorten the time to resolution for both systems. Another thing that shortens resolution time in both systems is an arbitral or court order granting a dispositive pre-hearing or pre-trial motion, such as one for summary judgment in favor of the employer or the employee. No study that I know of has compared the time in arbitration and litigation from filing to settlement or to granting a summary disposition motion. Nor has any study examined the time from filing an arbitration demand through a motion to vacate an award (the denial

of which could also be appealed). Clearly, challenging the enforcement of an award would lengthen the arbitration process. Appeals also lengthen the litigation process. Research indicates that appeals from trial judgments are common in employment litigation.¹³

Empirical research is needed to assess the impact that settlements, summary dispositions and appeals have on arbitration cases and then compare them to litigation.

Another area needing empirical research is whether arbitration procedures include due process protections.¹⁴ There is also a question of how well commonly accepted due process standards, for example the Employment Due Process Protocol,¹⁵ developed in the 1990s by representatives of leading organizations involved in employment law and arbitration, are being enforced.

The AAA, which participated on the task force that created the Due Process Protocol, applies the protocol to employer-promulgated arbitration cases it administers. According to the introduction to the AAA Employment Arbitration Rules, if the AAA finds that a program "on its face substantially and materially deviates" from the minimum due process standards in the AAA rules *and* the Due Process Protocol, "the Association may decline to administer cases under that program."¹⁶

Established arbitration service providers, like the AAA, offer advantages from a due process perspective. One is that they have well-established rules that incorporate minimum due process protections and provide some basis for accountability if the arbitrator does not enforce them.

To date, the best and only evidence on enforcement of due process standards by arbitration service providers is the research on consumer arbitration conducted by the Searle Institute under the leadership of Prof. Christopher Drahozal.¹⁷ Searle's preliminary report concluded that the AAA is effectively enforcing due

process protections in its consumer arbitration procedures.

On a much more limited level, I looked at one aspect of due process in my 2006 study of AAA employment arbitration cases—whether the AAA was complying with its own rule requiring employers to assume the burden of all fees (apart from a small filing fee) in arbitration cases under employer-promulgated arbitration programs. I found general compliance with this rule. However, there is no substitute for a full-scale study of the enforcement of due process standards in employment arbitration generally on the level of the Searle Institute's study. In my view, if confidence in the due process of employment arbitration is to be enhanced, it is important that arbitration service providers follow the lead of the AAA in providing academic researchers with access to their data.

The picture of due process in *ad hoc* arbitration is an unknown. These cases have no arbitration service provider and no established rules to provide employees with procedural due process. These cases may never see the light of day unless the employee challenges the award in court (as in the notorious *Hooters* case¹⁸). As a result, obtaining data to research what is happening in these cases will continue to be a challenge.

Another area for empirical research is the outcomes of arbitrations under employer-promulgated arbitration agreements and how they compare to outcomes of litigation. Some early studies found relatively similar outcomes in litigation and arbitration. For example, Delikat and Kleiner found employee win rates and average awards of damages in cases administered under the securities industry arbitration rules to be similar to the outcomes in cases litigated in the U.S. District Court for the Southern District of New York.¹⁹

Although an interesting study, it involved a distinguishable population since employees in the securities industry tend to be relatively highly

paid and work under contracts and rules particular to that industry.

Eisenberg and Hill also examined the question of arbitration and litigation outcomes in their 2003 study. They reported similar employee win rates for litigation and employment arbitration cases involving individually negotiated agreements, but lower employee win rates in arbitration cases involving employer-promulgated plans. They assumed that claimants under individually negotiated agreements were higher-paid and that claimants under employer-promulgated agreements were lower paid. Eisenberg and Hill did not have access to the salary levels of the arbitration claimants involved in their study. In my view their assumption seems reasonable because of the type of cases involved.

It is likely that there are substantial differences between cases involving individually negotiated and employer-promulgated agreements. Eisenberg and Hill found when they examined the area of damages awarded. There were 44 non-civil rights arbitrations involving individually negotiated contracts. The median or typical²⁰ award was \$94,984 and the average (mean) award was \$211,720.

There were 26 arbitrations based on employer-promulgated agreements. The typical and average awards in these proceedings were much lower: the typical award was \$13,450 while the average award was \$38,723.

Eisenberg and Hill's study also found higher typical and average jury awards in favor of non-civil rights plaintiffs in state court cases. Using data from 79 cases, they found that the typical award was \$68,737 and the average award was \$462,307.

Eisenberg and Hill did the same type of analysis for civil rights based cases. For two arbitrations involving individually negotiated agreements the typical and award were both \$32,500. For six civil rights arbitrations based on employer-promulgated plans, the median award was \$56,096 and the mean award was \$259,795.

However, given that Eisenberg and Hill had only 26 cases under employer plans and only eight civil rights arbitration cases in their data (compared with a much larger sample of state and federal court cases involving employment discrimination claims²¹), we should not over-interpret their results.

My 2006 study was not so limited, thanks to the California-required disclosures imposed on private arbitration providers. I had data on 836 AAA cases involving employer-promulgated arbitration agreements that resulted in an award. This allowed me to analyze win rates and arbitral awards. I classified an employee win as any case in which some amount of damages greater than zero was awarded to the employees.

My analysis showed an average employee win rate of just 19.7%. This is substantially lower than the employee win rates found by Eisenberg and Hill using a much smaller sample. This result is also substantially lower than the win rates they reported in litigation and those reported by other researchers in more recent studies of litigation.²²

Eisenberg and Hill noted in their analysis that looking at win rates alone may not tell the whole story because outcomes may not reveal whether a claimant "truly succeeded." Thus, the win rate is only a starting point in the analysis. To obtain a fuller picture, the analysis needs to include other data, such as the amount of damages claimed versus the amount awarded and, if possible, the degree of participant satisfaction with the dispute resolution process.

My analysis of awards in the 836 arbitrations indicated that damages were awarded to employees in 165 cases. The typical award was \$40,624 and the average award was \$117,715. This is substantially less than the typical and average damages awarded to court litigants in the civil rights and non-civil rights cases analyzed by Eisenberg and Hill. Unfortunately, the reports required under California law do not require arbitration providers to

identify whether the cases involved civil rights or non-civil rights claims, so I was not able to break down the analysis by these categories.

To obtain a statistic to compare the average expected arbitration outcomes in arbitration and litigation (taking account of both the chance of winning and the average damages likely if the employee wins), I calculated the average award in the 836 arbitration cases used in my study, and the average damages awarded in the litigation cases used by Eisenberg and Hill in their study, including those where zero damages were awarded. Since the state court cases were from 1996, and the federal court cases were from 1999-2000, I adjusted them for inflation using 2005 dollars.

The average expected award for the arbitration cases was \$23,233. The average expected damages awarded in the non-civil rights cases litigated in state court was \$261,666 (\$325,707 in inflation-adjusted 2005 dollars²³). The average expected damages awarded in the employment discrimination cases were as follows: (1) \$209,578 (\$260,871 in 2005 dollars) for the cases litigated in state court, and (2) \$122,410 (\$143,497 in 2005 dollars) for the cases litigated in federal court.

Using the inflation-adjusted litigation figures for the purposes of comparison with arbitration, I found that the average expected award in the employment arbitrations was: 7.1% of the average expected outcome in the state court non-civil rights cases; 8.9% of the average expected outcome in the employment discrimination cases litigated in state court; and 16.2% of the the average expected outcome in the employment discrimination cases litigated in federal court.²⁴ Although litigation and arbitration win rates and damage award could vary over time and it is not clear how much state versus federal court outcomes should be weighted in the analysis because we do not know the reason for the different state and federal court results, the

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overall picture shows a large gap in the average expected outcomes in arbitration and litigation.

We do not know what factors may explain this result. The next task is to identify what these factors are and how much they contribute to outcomes in arbitration and litigation. (The kind of research that is needed is similar to the investigation into the cause of the male-female wage gap, which resulted in women earning about 80% of what men earn for full-time work.²⁵) I suggest three possible areas for future research.

The first area concerns the distribution of types of claims and claimants in arbitration and litigation. Eisenberg and Hill took some steps in this direction by separating out non-civil rights from employment discrimination cases and arbitration cases involving individually negotiated agreements from cases involving employer-promulgated plans. Future researchers could gather more detailed information on case characteristics in both employment arbitration and litigation, including information on who the plaintiffs are in employment litigation. At this time, there is no empirical data on the salaries of employees in litigation.

Another area that could be researched relates to accessibility of arbitration and litigation to lower-income employees. Advocates of employer-promulgated arbitration plans assume that litigation is not accessible to low-income employees with small value claims and that arbitration is accessible for these employees.

Since California law requires private arbitration providers to classify the claimants according to certain income levels, I was able to look at the economic status of the claimants in question in my 2006 study. The data showed, on the one hand, that 77.4% of the employment arbitration claimants earned less than \$100,000 a year, and on the other, that three quar-

ters of the claims were over \$36,000, and the typical (median) amount claimed was over \$100,000. These claims probably would not be considered small.

Accessibility is a difficult area to research because we only observe the cases in which people go to arbitration or litigation, not those who do not access either forum. Low numbers of cases might indicate barriers to access, but could also indicate effective resolution of problems before disputes enter the litigation or arbitration system. Case studies of companies that have adopted internal grievance procedures, such as internal management appeals boards, mediation, or peer review,²⁶ along with employment arbitration suggest that they can resolve many cases, with potential advantages from both the employees and the organization's point of view.²⁷

If internal grievance procedures are filtering out stronger claims before arbitration, it would mean that the employee win rate is lower than it otherwise would be.²⁸ This is an area worth further examination.

My early research found a significantly greater likelihood that cases would be resolved in favor of the employee in internal grievance procedures where these procedures were adopted with employment arbitration as a later step in the procedure.²⁹ This strongly suggests that we should not view arbitration in isolation, but in conjunction with the internal conflict management systems adopted by organizations.

Another area that should be examined is whether there are decision-maker effects. Do employment arbitrators, judges or juries tend to favor employers over employees or vice versa? Research conducted by Klaas, Mahony and Wheeler found that employment arbitrators (particularly those with management backgrounds) ruled in favor of employees less often than a comparison group of individu-

als who had served as jurors in employment litigation cases.³⁰ This study used a policy-capturing methodology in which subjects were sent a questionnaire asking them to evaluate a set of hypothetical cases. Although a commonly used and accepted technique in social science research, at this point in time, there is no field research involving actual cases to confirm this study's results. (One must be careful not to overstate the authors' conclusions. For example, they did not conclude that all arbitrators with management backgrounds rule in favor of employees.) Thus, future researchers could explore whether there is a clear relationship between arbitral decisions and the background or other characteristics of the arbitrator.

Training all arbitrators in the ethical obligation to be neutral, fair, and apply correct legal principles is vital to the health of employment arbitration. So is the opportunity for parties to select from a balanced roster of neutrals who have a variety of backgrounds and experiences.

Conclusion

Empirical research on employment arbitration is a challenging field that in many ways is still in its infancy. We are still trying to answer basic questions about the general characteristics of this dispute resolution system. For empirical researchers to do so will require the ongoing assistance and support of the organizations and practitioners in this field. The AAA has a record as a leader in improving the arbitration process and in granting researchers access to data. Much of the best empirical research has come from its data. Other organizations should follow the AAA's lead and help develop a sound basis for answering the many questions that continue to be posed in this field. ■

¹ *Gilmer v. Interstate Johnson/Lane*, 500 U.S.

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¹ *Gilmer v. Interstate Johnson/Lane*, 500 U.S. 20 (1991).

² *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

³ For estimates, see: Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" 11(2) *Employee Rts. & Employment Pol'y J.*, 405-47 (2008).

⁴ David Lewin, "Employee Voice and Mutual Gains," Proceedings of the 60th Annual Meeting of the Labor and Employment Relations Association (LERA), pp. 61-83 (2008).

⁵ See e.g. Katherine Van Wezel Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s," 73 *Denver U. L. Rev.* 1017-50 (1996); David Schwartz, "Mandatory Arbitration and Fairness," 84 *Notre Dame L. Rev.* 1247-368 (2009).

⁶ See e.g. Samuel Estreicher, "Saturns for Rickshaws: The Stakes in the Debate Over Pre-Dispute Employment Arbitration Agreements," 16 *Ohio St. J. on Disp. Resol.* 559-68 (2001); David Sherwyn, Samuel Estreicher & Michael Heise, "Assessing the Case for Employment Arbitration: A New Direction for Empirical Research," 57 *Stan. L. Rev.* 1557-92 (2005).

⁷ H.R. 1020 & S. 931: Arbitration Fairness Act of 2009.

⁸ "Arbitration and Litigation of Employment Claims: An Empirical Comparison," 58(4) *Disp. Resol. J.* 44 (Nov. 2003).

⁹ Cal. Civ. Proc. Code § 1281.96. The disclosure requirement applies to "consumer" arbitration, which the statute defines to include employment and other kinds of cases. The statute requires disclosure of such facts as: the name of the non-consumer party; if a business entity, the type of dispute involved, the amount of the employee's annual wage, the prevailing party, whether the consumer was represented by counsel, the type of disposition (e.g., withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing), the amount of the claim, the amount of the award, and any other relief granted, if any; as well as the arbitrator's name the total arbitrator fee for the case, the allocation of that fee to the parties.

¹⁰ The results were published in the *Employee Rts. & Employment Pol'y J.* See Colvin, *supra*, n. 1.

¹¹ See n. 9 where the California statute describes what is included in the term "dispositions."

¹² It is also possible that litigation has achieved (and could still achieve) some efficiencies since the Eisenberg and Hill study, which used court data from 1996 and 1999-2000.

¹³ Kevin M. Clermont & Stewart J. Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court," 1(2) *J. Empirical Legal Stud.* 429-58 (2004).

¹⁴ The content of due process standards is an issue heavily debated in the legal literature. See e.g. Richard Bales, "The Employment Due Process Protocol at Ten: Twenty Unresolved Questions and a Focus on Conflicts of Interest," 21 *Ohio St. J. on Disp. Resol.* 165 (2005).

¹⁵ The Due Process Protocol is available on the AAA Web site at www.adr.org/sp.asp?id=28535.

¹⁶ The AAA Employment Arbitration Rules are available on the AAA Web site at www.adr.org.

¹⁷ "Consumer Arbitration Before the American Arbitration Association: Preliminary Report," Searle Center on Law, Regulation and Economic Growth, Northwestern Univ. School of Law, March 2009, available online at www.searlearbitration.org/.

¹⁸ *Hooters of Am. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

¹⁹ Michael Delikat & Morris Kleiner, "An Empirical Study of Dispute Resolution Mechanisms: Where do Employees Better Vindicate Their Rights?" 58(3) *Disp. Resol. J.* 56-58 (Nov. 2003).

²⁰ A "median" is the midpoint of a distribution, so that half of the awards would be larger than the median award and half would be smaller than the median award. The median can be useful in providing additional information about a distribution compared to just an average. Where there are a few large awards, which is the case for both arbitration and litigation, this will tend to produce an average (or mean) that is higher than the median.

²¹ For 68 state court employment discrimination cases in 1996 they found a median award of \$206,976 and a mean award of \$478,488. For 408 federal court employment discrimination cases in 1999-2000, they reported a median award of \$150,500 and a mean award of \$336,291.

²² This is compared to either the 36.4% employee win rate in 1999-2000 federal discrimination court trials or the 56.6% employee win rate in 1996 state court trials not involving civil rights

claims reported by Eisenberg and Hill. Oppenheimer found similar employee win rates of 50% in 272 civil rights and 59% in 117 non-civil rights cases in California courts from 1998 and 1999: David Benjamin Oppenheimer, "Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities," 37 *U.C. Davis L. Rev.* 511 at 535-49 (2003).

²³ I made the inflation adjustments to 2005 dollars using the Bureau of Labor Statistics inflation adjustment calculator (available at <http://data.bls.gov/cgi-bin/cpicalc.pl>) in order to allow a constant dollar comparison with the arbitration cases in my 2006 study.

²⁴ Since it is not possible to identify the proportion of civil rights versus non-civil rights cases in the arbitrations, the point of comparison would fall somewhere in the range between 7.1% and 16.2%.

²⁵ U.S. Bureau of Labor Statistics, "Highlights of Women's Earnings in 2008," Rpt. 1017, July 2009.

²⁶ See Alexander J.S. Colvin, "The Dual Transformation of Workplace Dispute Resolution," 42 *Indus. Rel.* 712-35 (2003).

²⁷ E.g. Alexander J.S. Colvin, "Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace," 13 *Advances in Indus. & Lab. Rel.* 71-97 (2004); David Sherwyn, Samuel Estreicher, & Michael Heise, *supra*, n. 6; and Richard A. Bales & Jason N.W. Plowman, "Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example," 26 *Hofstra Lab. & Emp. L.J.* (2008).

²⁸ The term researchers use for this is "appellate effect," I have chosen not to use the term here because it may be misleading to people who are unfamiliar with the term.

²⁹ See Colvin, *supra* n. 26.

³⁰ Brian Klaas, Douglas Mahony & Hoyt Wheeler, "Decision-Making About Workplace Disputes: A Policy—Capturing Study of Employment Arbitrators, Labor Arbitrators and Jurors," 45 *Indus. Rel.* 68-95 (2006). The study found that the greater likelihood of employment arbitrators to rule in favor of employers could be accounted for by the higher likelihood of those arbitrators who came from employer-side backgrounds ruling against the employee.

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